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Supreme Court, U.S.
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In the

# Supreme Court of the United States

October Term, 1998

ERIK GUNDACKER AND DALE C. NATHAN,

*Petitioners,*

-v-

UNISYS CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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70 pp

## Questions Presented For Review

I. Is it permissible for a district court to assess over $20,000 in sanctions against an attorney, and order that the attorney's name be listed on a list of dishonorable lawyers, primarily or in significant part because the attorney stated in pleadings submitted to the court, which statements were never published in the media, that the effect of court rulings was to enable a government contractor to hide evidence of fraud against the federal government and get away with crimes against the federal government?

II. Was it permissible for the lower court to assess sanctions and the appeals court to approve sanctions assessed against an attorney because he complied with a subpoena issued by the Inspector General of the Department of Defense in connection with an investigation of claims made in a suit filed under seal pursuant to 31 U.S.C. § 3130, and delivered documents to the Inspector General's representative that his client had taken from the defendant when he worked there where the attorney did not violate any court order or a settlement agreement reached by the parties in the wrongful discharge action, but failed to provide notice to the defendant in advance of complying with the subpoena as he had orally promised to do in a court hearing several weeks before he was served with the subpoena?

III. Was it error for the lower courts to rule, and the appeals court to approve a ruling, that a document was protected by the attorney work product privilege and could be suppressed by the defendant where the document is a five page list of illegal charges to a

government contract that was generated by company personnel at the request of outside counsel?

IV. Was summary judgment dismissing plaintiff's wrongful discharge action under a state whistle blower statute proper where there was a disputed issue of material fact in that plaintiff produced evidence that he was re-evaluated for the purpose of a layoff list and then laid off shortly after he refused to perform acts he believed were illegal because they constituted fraud against the federal government where the trial court ruled that (1) plaintiff had obeyed a order not to substitute personnel performing a government contract on the basis that he testified in deposition that he had "used" co-workers, meaning he had worked with them after he was relieved of supervisory duties, and (2) plaintiff had not "walked off the job."

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## Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit in Erik Gundacker v. Unisys Corporation, Nos 97-2969 and 97-4380 is unreported. The judgments of the United States District Court for the District of Minnesota, Civil No. 4-95-676 are unreported. The Report and Recommendation of the Magistrate Judge, Civil File 4-95-676, is unreported and is filed under seal.

## Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. §1254. The United States Court of Appeals for the Eighth Circuit issued its opinion in this case on August 7, 1998. This petition was filed within 90 days of the Opinion's issuance and is timely.

## Constitutional and Statutory Provisions Involved

Amendment 1 to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## Statement Of The Case

*Introduction*

Petitioner Erik Gundacker (hereinafter "Gundacker") is a former employee of respondent Unisys Corporation ("Unisys"). Gundacker was laid off in January, 1994. He claims he was selected for layoff because he protested against

and would not engage in frauds against the United States Government by Unisys in connection with the performance of government contracts. Gundacker brought suit against Unisys. In his Complaint he asserted a cause of action based on Minnesota Statutes § 181.932, subd. 1(c), wrongful discharge in violation of the Minnesota Human Rights Act. Unisys eventually moved for summary judgment. The Trial Court ordered summary judgment in favor of Unisys and dismissed Gundacker's wrongful discharge cause of action. Gundacker appealed the Trial Court's ruling dismissing his causes of action. The Court of Appeals for the Eighth Circuit affirmed the Trial Court.

Gundacker also appealed rulings by the Trial Court concerning a document Unisys inadvertently disclosed during initial disclosures. Unisys contends the document is work product and as such is privileged. Gundacker contends that the document is evidence of an ongoing crime against the United States and cannot be protected as privileged under the crime-fraud exception to privilege. The document is a five page list of illegal charges to a government contract. After Gundacker's attorney (hereinafter "Nathan") first obtained the document, he asked the Trial Court for permission to give the document to the United States Attorney. The Trial Court denied his requests to do so. Prior to July, 1995, Nathan referred to the Inadvertently Disclosed Document in pleadings and to others. In July, 1995, the Trial Court ordered him not to refer to the this document and he did not do so thereafter except in pleadings submitted to the Trial Court. In 1995, Unisys filed a counterclaim in which it demanded return of the Gundacker Documents. Later in 1995, Gundacker initiated a *False Claims Act (Qui Tam)* suit against Unisys, which was filed under seal and not revealed to Unisys as required by statute. This suit, which is in progress, alleges that Unisys defrauded the federal government out of more than $1 billion

over a period of several years. Gundacker and Nathan complied with requests by government investigators to provide information and documents. In April, 1996, as part of a settlement, Gundacker agreed to deliver the Gundacker Documents to counsel for Unisys. Before this occurred, the government subpoenaed the Gundacker Documents. Nathan delivered them to the government without first giving Unisys notice of the subpoena as he had orally promised at a hearing approximately three weeks earlier. The Trial Court assessed sanctions based on findings that Nathan referred to the inadvertently disclosed document in violation of court orders, that he impugned the integrity of the court by stating that the effect of the court orders concerning the inadvertently disclosed document was to enable Unisys to hide evidence and get away with crimes against the federal government, and that Nathan had breached the settlement agreement by complying with a subpoena without first providing notice to Unisys. The Trial Court assessed over $20,000 in damages to be paid in part by Nathan and in part by Nathan and Gundacker jointly. The Eighth Circuit Court of Appeals affirmed the sanctions assessments against Nathan and reversed the sanctions assessments against Gundacker.

Facts

Wrongful Discharge

Prior to November, 1993, Gundacker had protested orders to perform acts he believed were illegal on several occasions and had refused to perform those acts. In November, 1993, Gundacker was a project manager responsible for performing a project under a Navy contract. He was ordered to substitute personnel performing the project. He also was ordered to charge the salaries of the replacement personnel to overhead. Gundacker protested these orders because he believed they were illegal. He refused to substitute personnel

because he believed they did not have sufficient experience to perform the work required by the contract and because they were paid at higher rates than the persons they were to replace, which would cause the cost of the project to exceed its budget. Gundacker did not substitute personnel. Gundacker refused to charge the time of the replacement personnel to overhead because this is illegal under federal procurement regulations. On November, 14, 1993, Gundacker was relieved of all management responsibility. Other personnel at Unisys substituted personnel on the project Gundacker had been managing. Individuals other than Gundacker directed the substitute personnel on where they were to charge their time. Gundacker continued working on the project in a nonsupervisory, nonmanagerial capacity. Within a short time after Gundacker was removed from management, his supervisor re-evaluated his ranking for purposes of layoff from rank number 12 to 35, the last position for his group. In January, 1994, Gundacker was selected for layoff.

The Trial Court ruled that: (1) Deposition testimony by Gundacker that he "used" personnel in continuing work on a government contract after he had been relieved of managerial responsibilities conclusively proved that he did not refuse to perform acts he believed were illegal; (2) Gundacker failed to walk of the job; and (3) Gundacker failed to disprove the pretextual reasons given by Unisys for his discharge. On the basis of these rulings, the Trial Court ordered summary judgment in favor of Unisys and dismissed Gundacker's claims of wrongful discharge.

Inadvertently Disclosed Document

During initial disclosures in 1994, Unisys produced a document it did not intend to produce. The document is marked as work product privileged. It has been referred to

since as the Inadvertently Disclosed Document. The document consists of five pages. It lists illegal charges to a Navy contract known as the TEAMS III contract. Unisys has asserted that the Inadvertently Disclosed Document was prepared at the direction of its attorneys as part of an investigation.

The Inadvertently Disclosed Document is described or mentioned in six court orders copies that are part of the Trial Court file, none of which were filed under seal. The Inadvertently Disclosed Document had been generated at the direction of Unisys' counsel. A copy of the document is in the court file under seal as an attachment to an Affidavit dated October 4, 1994 of Dale C. Nathan. The Trial Court in its first three rulings ordered that the Inadvertently Disclosed Document was privileged and would remain under seal. In the fourth order, the Trial Court ordered Gundacker and his counsel not to mention the Inadvertently Disclosed Document. The Trial Court's fifth order by a magistrate judge provided that the Inadvertently Disclosed Document could be reviewed a government investigator. The Trial Court's sixth order concerning this document reversed the magistrate judge's ruling.

Sanctions

When Gundacker's attorney, Dale C. Nathan ("Nathan") received the Inadvertently Disclosed Document, he immediately recognized it as evidence of an ongoing crime against the federal government. Nathan made and took a copy of the Inadvertently Disclosed Document with him when he left the offices of counsel for Unisys. Subsequently, Unisys demanded that Nathan return the Inadvertently Disclosed Document. Nathan refused. He filed the Inadvertently Disclosed Document with the court as an attachment to

an affidavit. Unisys moved for an order requiring Nathan to return the Inadvertently Disclosed Document. Nathan argued that a copy of the Inadvertently Disclosed Document should be delivered to the United States Attorney. Magistrate Judge Boline ruled that he had not been shown that he had authority to take such action and ordered that the Inadvertently Disclosed Document be returned to Unisys. The Inadvertently Disclosed Document was returned to Unisys. Magistrate Judge retired shortly thereafter and was replaced by Magistrate Judge Ann D. Montgomery.

In late 1994, Nathan renewed his request that a copy of the Inadvertently Disclosed Document be provided to the United States Attorney. This time, he cited authority - the Crime-Fraud Exception to privilege and the Misprison of Felony Statute, 18 U.S.C. 4. Magistrate Judge Montgomery denied Nathan's motion on the basis that she would not revisit the ruling made by Magistrate Judge Boline and that Nathan failed to demonstrate that the Crime-Fraud Exception applied to the Inadvertently Disclosed Document. Nathan appealed Magistrate Judge Montgomery's ruling to Judge Richard H. Kyle. He affirmed Magistrate Judge Montgomery's ruling.

In July, 1995, Magistrate Judge Montgomery, at the request of Unisys, ordered that Nathan and Gundacker must refrain from even mentioning or referring to the Inadvertently Disclosed Document.

In October, 1995, Magistrate Judge Montgomery, *sui sponte*, ordered that the government's investigator could have access to any document in the court file including the Inadvertently Disclosed Document. The motion she ruled on, which was a motion by Gundacker concerning discovery matters, did not mention or involve the Inadvertently Disclosed Document. Unisys appealed Magistrate Judge

Montgomery's ruling on the investigator's access to sealed pleadings. Judge Kyle reversed Magistrate Judge Montgomery and ruled that the government's investigator could not have access to the Inadvertently Disclosed Document. Thereafter, Unisys and the government's investigator entered into an agreement in January, 1996, that specifically refers to the Inadvertently Disclosed Document.

While Gundacker was employed by Unisys, he accumulated three barrels of company documents that he thought were evidence of crimes by Unisys against the federal government. He stored these documents at his home. The documents became known as the Gundacker documents.

During the pendency of the wrongful discharge suit, Gundacker filed a False Claims Act (*Qui Tam)* against Unisys. After this suit was filed, the government's investigator asked Gundacker to provide information and copies of documents that supported the claims made in the *Qui Tam* suit. Gundacker and Nathan selected copies of the Gundacker documents that they believed were most pertinent to Gundacker's claims and provided them to the government in accordance with 31 U.S.C. 3730(b)(2), which states in pertinent part:

> "A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.:

Nathan did not provide copies of documents produced by Unisys in discovery and thereby subject to the Confidentiality Stipulation and Order. This was unnecessary because

copies of almost all the documents produced by Unisys in discovery were included in the Gundacker Documents.

In August, 1995, Unisys asserted a counterclaim against Gundacker in which Unisys demanded return of the Gundacker Documents. By Order dated March 12, 1996, the Trial Court granted summary judgment in favor of Unisys and dismissed all of Gundacker's claims in the wrongful discharge suit. In connection with the motion and hearing on Unisys' summary judgment motion, Gundacker filed a memorandum in opposition to the motion for summary judgment and the Affidavit of Dale C. Nathan in support of Gundacker's opposition to Unisys' motion for summary judgment. These documents were not filed under seal. The information included in these documents and attachments to Nathan's affidavit include every document and fact that Unisys has repeatedly claimed is confidential and must be kept under seal. Unisys did not object to or ever request that the memorandum and affidavit mentioned above should be placed under seal.

During 1996, there were periodic requests by the government's investigator for documents and information in connection with the *Qui Tam* suit, and Nathan responded. Beginning in September, 1996, Unisys made demands and threats concerning the Gundacker Documents. Unisys demanded that all the Gundacker Documents be returned, and threatened to vigorously pursue its counterclaim if their demands were not met. In February, Nathan informed Unisys of his position that Gundacker had the right to provide copies of the Gundacker Documents to the government. Nathan did not disclose the fact that a *Qui Tam* suit was in progress. The *Qui Tam* was under seal at the time. In March, 1997, Unisys served a motion for a temporary restraining order to enjoin Gundacker and Nathan from "disclosing documents or

information belonging to Unisys Corporation." The motion was referred to Magistrate Judge Raymond L. Erickson, who succeeded Magistrate Judge Montgomery after she became a district court judge. A hearing on Unisys' motion was held March 28, 1997. Magistrate Judge Erickson was extremely harsh with Nathan. He mentioned the possibility of sanctions if Gundacker Documents were provided to third persons. Nathan did not inform Magistrate Judge Erickson of the existence of a *Qui Tam* suit because he believed it would be improper to do so. Magistrate Judge Erickson took the Unisys motion under consideration.

Before ruling on the Unisys motion, Magistrate Judge Erickson, at the request of Unisys, scheduled a settlement conference. The settlement conference was held in the morning on April 11, 1997. Unisys wanted to recover the Gundacker Documents. Gundacker wanted to appeal the Order dated March 12, 1996. A settlement was reached. The terms are stated in the Report and Recommendations of Magistrate Judge Lebedoff (at pages 9-10). The existence of the *Qui Tam* was not revealed during settlement discussions.

In the afternoon of the same day that settlement was reached, the government's investigator made another request for copies of Gundacker Documents. Nathan did not provide the documents he requested. Instead, he wrote to counsel for Unisys and stated his opinion that the Settlement Agreement did not preclude him from providing copies of the Gundacker Documents to the government prior to delivering the documents to Unisys at the end of May, 1997. Unisys quickly scheduled a telephone conference call with Magistrate Judge Erickson. Because of his earlier experience with Magistrate Judge Erickson, Nathan informed Unisys that he would tape the telephone conference and take other actions that he believed were appropriate to protect himself. In the telephone

conference, which was recorded by Magistrate Judge Erickson's court reporter, Magistrate Judge Erickson ordered Nathan not to provide copies of Gundacker Documents to anyone and scheduled a hearing on April 21, 1997 in St. Paul. At the hearing on April 21, 1997, Nathan promised to give notice if he received a subpoena prior to delivering documents in response to the government. Subsequent to the hearing on April 21, 1997, Nathan informed the government's investigator that he could not provide any more copies of the Gundacker Documents unless there was a subpoena. Nathan did not ask for a subpoena nor did he suggest that the government issue a subpoena. Approximately three weeks later, the government's investigator served a subpoena on Nathan issued by the Inspector General of the Department of Defense. Nathan complied with the subpoena. At the time he did not recall that he had orally promised to give Unisys notice before complying with the subpoena. After he delivered the Gundacker Documents to the government, Nathan informed Unisys that he had received and complied with a subpoena for the Gundacker Documents.

Basis of Sanctions

The basis for sanctions stated in the Trial Court's Order dated October 24, 1997 (pages 2-3) are:

1. Judges and magistrate judges repeatedly reminded Nathan of his obligations under the confidentiality stipulation which was entered as a protective order in this case;
2. The court repeatedly ordered documents plaintiff filed to be sealed because plaintiff's counsel mentioned in them an inadvertently produced privileged document which was subject to the protective order.

3. Plaintiff and his counsel participated in a settlement conference on April 11, 1997 and agreed to a settlement;
4. Plaintiff's counsel stated his intention to violate the settlement agreement;
5. Plaintiff's counsel implied that he would not obey an order of this Court if it were filed under seal or if it were not in writing;
6. Plaintiff's counsel repeatedly impugned the integrity of the Court and its judicial officers.
7. Plaintiff's counsel represented to the Court that he would not seek a subpoena from the government and that he would advise defense counsel before complying with such a subpoena, yet he took actions that had the effect of soliciting a subpoena and failed to notify defense counsel until after he complied with it.

## Reasons for Granting the Writ

It is a violation of free speech for courts to sanction an attorney because he stated in pleadings that the effect of court rulings allowing a defendant to suppress a document claimed to privileged as attorney work product was to enable to defendant to conceal evidence of and get away with crimes against the federal government.

The federal government's investigations into allegations of fraud by government contractors will be seriously impaired if courts can sanction attorneys for complying with a valid subpoena issued by an authorized official because the attorney did not give the target company advance notice before delivering the documents subpoenaed so that the target company could attempt to block the subpoena.

Frauds against the federal government will be greatly facilitated if perpetrators such as government contractors can hide evidence of their frauds by declaring such evidence privileged as attorney work product.

Frauds against the federal government will be greatly facilitated by rulings dismissing wrongful discharge suits on summary judgment because the employee did not disprove the company's pro-offered reason for discharge even though the employee produced evidence supporting his claim that his refusal to commit an illegal act was the reason for his discharge.

## Argument

I. The Trial Court improperly granted summary judgment in favor of Unisys on Gundacker's wrongful discharge causes of action because there are disputed issues of material fact.

On a motion for summary judgment, the Court must examine all of the evidence submitted and, when viewing the facts in the light most favorable to the plaintiff and giving him the benefit of all reasonable factual inferences, may only grant judgment if there exists no genuine issue of material fact and judgment is appropriate as a matter of law. Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991).

This is especially so in employment discrimination cases. Id. Courts throughout the United States have denounced summary judgment as inappropriate in employment discrimination cases. The Eighth Circuit Court of Appeals has emphasized:

> Summary rulings are the direct antithesis of the full and fair process found in the adversary proceeding.... Summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. Summary judgments should seldom be used in cases alleging employment discrimination because of the special category in which Congress and the Supreme Court visualized these cases. (emphasis added)

Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363, 364 (8th Cir. 1987) see also Johnson, 931 F.2d at 1244 (reaffirming Hillebrand).

The Fifth Circuit Court of Appeals has similarly noted that summary judgment is both "inappropriate" and "questionable" for resolving claims of employment discrimination. Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 640 (5th Cir. 1985); Hayden v. First National Bank, 595 F.2d 994, 997 (5th Cir. 1979). Studies also reflect the courts' dislike for summary judgment in employment discrimination cases:

> In deciding appeals from award of summary judgment pursuant to motions challenging the sufficiency of evidence of discrimination, the circuit courts reversed 59 of 96 decisions between 1979 and 1985. During this same time frame published district court opinions reflect denial of 121 out of 180 motions for summary judgment. Considering the practice of many federal district judges in denying motions for summary judgment without writing an opinion, published or unpublished, the actual percentage of motions that are denied in probably much higher than the 67 percent denial rate reflected by the published opinions.

J. Jansonius, The Role of Summary Judgment in Employment Discrimination Litigation, 4 the Labor Lawyer 747, 759 (1988) (footnotes omitted).

Moreover, the Minnesota Court of Appeals has stated that whistleblower cases should be analyzed under the same framework as that employed in cases under Title VII and the

Minnesota Human Rights Act. See McGrath v. TCF Savings Bank, 502 N.W.2d 801, (Minn. App. 1993) (citing Phipps v. Clark Oil & Refining Corp 408 N.W.2d 569 (Minn. 1987).

**Substantial Evidence of Defendant's Whistleblower Violations Precludes Summary Judgment on Plaintiff's Statutory Claims.**

1. Evidence of Unisys' retaliation against Gundacker for refusing to substitute personnel, or to mischarge Government contracts precludes summary judgment.

Minn. Stat. §§ 181.931 - .935 are the statutory portion of Minnesota's comprehensive whistleblower protection laws. Section 181.932 provides, in pertinent part:

> An employer may not discharge, discipline, threaten, discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
>
> > (a) the employee * * * in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official; [or]
> >
> > ***
> >
> > (c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation

> adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

As explained in a recent Minnesota Court of Appeals decision, the familiar three-part, McDonnell-Douglas test used to analyze discrimination claims is also applicable to statutory whistleblower claims. McGrath v. TCF Sav. Bank, 509 N.W.2d 365 (Minn. 1993). Under this analytical framework, the plaintiff must demonstrate a prima facie case of the employer's whistleblower violation. Depending on the subparagraph of the statute, this requires either that the employee show (a) a "good faith belief" that the conduct reported was somehow unlawful or (b) an "objective basis in fact" that the action required by the employer and refused by the employee was somehow unlawful and that the employee informed the employer of this belief.

Once made, the employer has to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer is able to do so, the analysis proceeds and ultimately focuses on whether the employer's action was actually based on its stated reason or whether the employer was motivated by a retaliatory intent (noting that, under Anderson v. Hunter, Keith, Marshall & Co., 417 N.W. 2d 619, 624-26 (Minn. 1988), "if there is a discriminatory reason for discharging the employee, the employer is liable for wrongful discharge even if there is also a nondiscriminatory reason").

Under both subparagraphs (a) and (c) of Minn. Stat. § 181.932, Gundacker has presented not only a prima facie case of whistleblowing retaliation but also substantial evidence that Unisys' proffered reason for discharge--the reranking of Gundacker and subsequent determination that his

performance and skills were inferior or superfluous to those of other employees--is a pretextual, sanitized attempt to rid the company of an employee who had protested illegal actions and refused repeatedly to engage in such practices.

2. Gundacker was Discharged Because He Refused to Commit Illegal Acts and Protested Orders to Commit Such Acts.

It is undisputed that Gundacker was re-evaluated in November 1993. This occurred with thirty days of Gundacker's refusal to accept an order to illegally substitute personnel in performing a government project and his protests concerning the order given him. Unisys denies that there is any connection between the re-evaluation of Gundacker in November 1993 and discharge of Gundacker in 1994, and his refusal to substitute personnel and his protests concerning that order. This is a disputed fact. It must be referred to the trier of fact. The Court of Appeals of Minnesota made this clear in Clough v. Ertz, 442 N.W.2d 798 (Minn.App. 1989). In that case, a discharged police chief alleged that he was terminated by city officials because he reported a suspected violation of state law and refused to violate state law by not enforcing the DWI statute. The defendants contended that the chief was fired because of a breakdown in communications. The trial judge granted summary judgment to defendants. This was found to be error by the Court of Appeals of Minnesota and was reversed. Applying the standard established by Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987), the Minnesota Appeals Court held that summary judgment was precluded because there was material issues of fact.

Where there are two potential reasons for discharge, one legitimate and one not legitimate, it is error in Minnesota

to suggest that an employer can avoid liability even if an illegitimate reason played a role in the discharge so long as the other proffered reason was not pretextual. McGrath v. TCF Savings Bank, 502 N.W.2d 801, 807 (footnote 20):

> "As we made clear in *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619 (Minn. 1988), even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision. *Anderson*, 417 N.W.2d at 627. *See also Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986)."

It is well established in Minnesota that summary judgment should not be granted in a wrongful discharge case where there are disputed issues of material facts. Eklund v. Vincent Brass and Aluminum Co., 351 N.W.2d 371 (1984).

The Trial Court's reference on page 9 of its Memorandum Order that Gundacker "used" other employees to perform the work in question is not accurate in context. Gundacker's deposition testimony that substitute personnel were used to perform the work does not mean that Gundacker obeyed the order to substitute personnel. As a matter of undeniable fact, he did not. At oral argument, the Court asked if, after personnel were substituted, Gundacker "walked away" from the job. The answer given was that Gundacker did not walk away from the job. This does not mean that Gundacker obeyed the order to substitute personnel. It means that he continued to work on the project as an individual, not a manager.

The Trial Court was mistaken on the law on pretextual reasons for discharge. The Court ruled in substance that the reasons stated by Gundacker's supervisor for discharging Gundacker must be accepted as fact and as true unless disproved by Gundacker. There is no authority to support that proposition.

The Trial Court thus required that Gundacker do more than present a basis from which a reasonable jury could find that Unisys' proffered reason for his discharge was a pretext. The Court ruled that Gundacker had to disprove Unisys' proffered reason for discharge. This clearly is not the law.

II. The inadvertently disclosed document is cannot be protected as privileged because it is evidence of an ongoing crime against the United States.

Substantial authority demonstrates that the Inadvertently Disclosed Document cannot be protected as privileged because it is evidence of an ongoing crime - the retention of payments obtained from the government by false claims. Unisys attorneys participated in a conspiracy to defraud. They issued the order to compile a list of unallowable charges against the Navy contract known as the TEAMS III contract. After the list was compiled, it was given to Unisys attorneys. At that time, they should have disclosed the unallowable charges to the government, or instructed Unisys to do that. They did neither. Instead, they marked the list as privileged and, with Unisys, kept this information hidden from the government. That is the perpetration of an ongoing crime.

The protection of attorney-client or work-product disappears when one seeks to obtain legal advice for an ongoing crime. Neither of these privileges will function as a shield to

protect the crime. Clark v. United States, 289 U.S. 1 (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." 289 U.S. at 15) United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971) ("Future intended illegality or furtherance of present, continuing illegality need not be shown beyond a reasonable doubt before the privilege can be defeated; it suffices to make out a prima facie case." 445 F.2d at 1086) In Re Grand Jury Subpoena Duces Tecum (Rich), 731 F.2d 1032 (2nd Cir. 1984) ("Advice sought in furtherance of a future or ongoing fraud is unprivileged; communications with respect to advice as to past or completed frauds are within the privilege." 731 F.2d at 1041) In Re Special Sept. 1978 Grand jury, 640 F.2d 49 (7th Cir. 1980 ("It is settled that the attorney-client privilege is waived when the client uses the attorney-client relationship to engage in ongoing fraud rather than to defend against past conduct" 640 F.2d at 59) In Re Berkley & Co., Inc., 629 F.2d 548 (8th Cir. 1980) ("When the attorney-client relationship has been thus abused we perceive no justification for sustaining the privilege in any context." 629 F.2d at 555) Pfizer Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972) ("A document-by-document review should be made and only those documents that seem to have been created in furtherance of the crime or fraud should be ordered produced."456 F.2d at 551)

The disclosure of privileged documents was at issue in X Corp. v. DOE, 805 F.Supp. 1298 (E.D.Va. 1992), affirmed without opinion Under Seal v. Under Seal, 17 F.3d 1435 (CA 4 1994) (62 FCR 14) ("X Corp. I"). In that case, an attorney employed as company counsel by X Corp. was discharged. Before he was discharged, he copied and took possession of documents that he believed were evidence of crimes by X Corp. against the federal government,

specifically, that X Corp. was defrauding the federal government in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733. Subsequently, X Corp. sued Doe seeking: (1) to enjoin Doe from revealing any of the information in the documents he took, and (2) requiring that Doe return the documents. X Corp. alleged that the documents were attorney-client privileged.

In its decision, the court focused on the "crime-fraud exception" to the attorney client privilege. As described by the court in X Corp. v. Doe:

> "Under the exception to the privilege commonly known as the 'crime-fraud exception,' communications made for an unlawful purpose or to further an illegal scheme are not privileged.[1]" 805 F. Supp. 1298 (E.D.Va. 1992) at 1306.

[1] See *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.") *Seventh Dist. Comm. of Va. State Bar v. Gunder*, 212 Va. 278, 183 S.E.2d 713 (1971) ("The rule of privilege is defensive, not offensive. If the communication between attorney and client relates to unlawful or fraudulent accomplishment, higher public policy, and the duty of an attorney to society as a whole, abrogates the privilege."). *See generally* 31 A.L.R.4th 458, 460-61; 81 Am.Jur.2d, Witnesses §§ 207-208. The crime-fraud exception applies only to

communication about ongoing or future activities. Communications concerning past crimes or frauds are privileged, unless the privilege has otherwise been waived. *See In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2nd Cir. 1984) (communications with respect to past frauds are privileged). *See also supra* note 15 (discussing waiver). Moreover, the crime-fraud exception applies without regard to the attorney's actual or constructive knowledge of the crime or fraud. *See In re Grand Jury Subpoenas* 89-3 and 89-4, 734 F.Supp. 1207, 1215 (E.D.Va.), *modified*, 902 F.2d 244 (4th Cir. 1990).

The court went on to say that:

> "To overcome an established privilege using the crime-fraud exception, the party opposing the privilege need make only a *prima facie* showing that the communications either (i) were made for an unlawful purpose or to further an illegal scheme or (ii) reflect an ongoing or future unlawful or illegal scheme or activity. The purported crime or fraud need not be proved." 805 F. Supp. 1298 (E.D.Va. 1992) at 1307.

The court ultimately determined in X Corp. v. Doe that Doe could disclose information that otherwise would be subject to the attorney-client privilege if he could show that: ". . . a reasonable attorney in his position would find the communication at issue to be convincing evidence of the perpetration of a fraud on the government during the course of his representation related to the subject matter of that

representation. But the fraud itself need not be conclusively proved." 805 F. Supp. 1298 (E.D.Va. 1992) at 1310.

In subsequent proceedings, the court found that Doe had not met the burden of showing that the communications at issue constituted convincing evidence of the perpetration of a crime.

The Crime-Fraud Exception rule is summarized in 64 ALR 4th 470 at 472 as follows:

> "However, a 'fraud exception' to the work product privilege has been recognized in a number of cases, with the result being that an attorney's mental impressions, conclusions, opinions, or legal theories may not be protected from disclosure. As a result, if there is evidence indicating that the attorney or client was involved in fraudulent or criminal activity during such consultation, the materials prepared by the attorney may be discoverable." 64 ALR Fed 470 at 472.

In In Re Berkley & Co., Inc. 629 F.2d 548 (8th Cir. 1980), the court recognized the crime-fraud exception rule as follows:

> "There is, however, an equally well-established exception to the privilege. Attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal or fraudulent scheme. In Re Murphy, 560 F.2d 326, 337 (8th Cir. 1977);

> *United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied* 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976); *Pfizer, Inc. v. Lord, supra. See Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). "The privilege takes flight if the relation is abused." Id. *See generally C. McCormick, Law of Evidence* § 95 (Cleary ed. 1972); 8 Wigmore on Evidence § 2298 (McNaughton Rev. 1961); J. Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 ABAJ 708 (1961)" 560 F.2d at 553

The Inadvertently Disclosed Document is a list of illegal charges to a government contract. This is evidence of a crime - fraud against the United States government.

III. "Referring to" an allegedly privileged document is not a valid basis for sanctions.

Recently, there was much publicity concerning documents that the tobacco industry claimed were privileged. News stories appeared almost daily that referred to these documents. To our knowledge, there has never been the slightest suggestion that referring to an allegedly privileged document is a violation of any kind. Certainly it is not a violation of the confidentiality order. That order does not say or suggest that a party cannot refer to a document claimed to be privileged. Unisys does not contend that Gundacker or his attorney provided a copy of the inadvertently disclosed document to anyone.

The best that Unisys can say is that Gundacker's attorney described the inadvertently disclosed document to third

persons. Again, we refer to the tobacco industry litigation. The documents in issue in that litigation were described extensively in news stories. That was never the basis for any claim of impropriety to our knowledge. Describing the document is not equivalent to disclosing the content of the document, which Unisys does not and cannot allege because neither Gundacker nor his attorney ever did that. The confidentiality order does not prohibit a party from describing a document as to which privilege is claimed and should not be extended to mean this. The confidentiality order precludes providing a copy of a document produced in discovery to third parties, or disclosing the content of the document to a third party, and as long as a description complies with these constraints, it cannot be said that describing the document is a violation of the confidentiality order.

It is not true that Gundacker or his attorney violated any court order not to refer to the inadvertently disclosed document, assuming that such an order was proper. Unisys alleged references by Gundacker's attorney to the inadvertently disclosed document. All of these alleged references occurred before Gundacker received the court order that first prohibited ~~reference~~ to the inadvertently disclosed document. That order was filed July 10, 1995, and was not received until after July 14, 1995. No order prior to the July 10, 1995 order instructs Gundacker or his attorney to not even refer to the inadvertently disclosed document. Unisys does not allege that Gundacker or his attorney referred to the inadvertently disclosed document to any third party after July 14, 1995.

IV. Obeying a subpoena issued by an authorized government law enforcement official should not be the basis for sanctions.

There was no court order prohibiting Gundacker or his attorney from complying with a subpoena or requiring either of them to inform Unisys of a subpoena before complying with it. Certainly, there is no such written order. There is no such oral order. At the hearing on April 21, 1997, the magistrate judge interpreted the settlement agreement to require that Gundacker give notice to Unisys before complying with a subpoena for production of the documents and Nathan promised to do that. Nathan does not dispute that the Gundacker Documents were delivered to the government's investigator in response to a subpoena prior to giving notice to Unisys. He emphatically denies that he solicited such a subpoena or requested it or had any control as to whether or not such a subpoena would be issued. He explained that he failed to recall his commitment not to respond to a subpoena before giving notice to Unisys. That is the truth. Moreover, we again note that prompt notice was given Unisys and that Unisys then persuaded the U. A. Attorney not to look at the documents until Unisys had an opportunity to present the matter to the District Court, which Unisys never did.

Although Nathan attorney may have breached the settlement agreement by delivering the Gundacker Documents to the government before he gave notice of the subpoena to Unisys, we do not believe that is a valid basis for sanctions. It may be that Unisys could pursue a claim for damages as a result of such a breach. However, Rule 16 does not say that breach of a settlement agreement can be the basis for an assessment of sanctions. Similarly, even if Nathan had given notice of the subpoena before delivering the Gundacker Documents to the government, Unisys still would have had to bring the matter before the District Court. Unisys could not have left Gundacker and Nathan in the position of refusing to obey a valid subpoena. Whatever additional proceedings occurred because of the subpoena would have had to occur in

some form. There was no significant additional litigation because of the failure to give prior notice, nor was there significant delay.

V. Criticism of District Court judges is not a valid basis for sanctions

Nathan did criticize district court judges and magistrate judges. In essence, he said that orders by those judges had the effect of enabling Unisys to hide evidence of crimes and to get away with the crimes. Nathan contends that he has the right to criticize these judges and that such criticisms are not a valid basis for sanctions as long as there is a factual basis for the criticisms.

In Standing Committee v. Yagman, 55 F.3d 1430 (9th Cir. 1995), the court said:

> "Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. In Re Graham, 453 N.W. 2d 313 (Minn. 1990)." 55 F. 3d at 1437
>
> . . .
>
> "Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be wrong." 55 F. 3d at 1438.

The principles applied in Yagman that we believe should be applied in this proceeding, are:

> "Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. See *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). Moreover, the disciplinary body bears the burden of proving falsity. See *Philadelphia Newspapers, inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S.Ct. 1588, 1563-64, 89 L.Ed.2d 783 (1986); *Porter*, 766 P.2d at 969
>
> "It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact.' *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed. 2d 1 (1990); *Lewis v. Time*, 710 F.2d 549, 555 (9th Cir.1983)" 55 F.3rd at 1438

In Bridges v. California, 314 U.S. 252 (1941), 62 S.Ct. 190, 86 L.Ed. 192 Justice Black said:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the

> character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." 314 U.S. at 270-71, 62 S.Ct. at 197-98, 86 L.Ed. at 207

**Conclusion**

In his 1961 farewell address, President Dwight David Eisenhower said: "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together."

President Eisenhower's fear has become a reality. The military-industrial partnership defrauds the government out of billions of dollars every year. Mega-corporations like Unisys Corporation use their huge resources and influence to defeat individuals like Gundacker who refuses to commit fraud and his attorney who dares to fight against the company's unlawful actions. Trial courts and courts of appeal should become more sensitive to the power of mega-corporations like Unisys and their highly skilled and paid

attorneys to persuade them to dismiss wrongful discharge suits on questionable grounds and assess heavy sanctions on invalid bases.

The Court should grant certiorari to review the important matters raised by this petition. Following that review, this Court should reverse the Eighth Circuit and order that Gundacker be given a trial on his claim of wrongful discharge, and that sanctions assessed against Nathan shall be vacated.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 97-2969 and 97-4380

Erik Gundacker,

Appellant,

v.

Appeals from the United States District Court for the District of Minnesota.

Unisys Corporation,

Appellee.

Submitted: June 11, 1998

Filed: August 7, 1998

Before BOWMAN, Chief Judge, HEANEY and LOKEN, Circuit Judges.

HEANEY, Circuit Judge.

In this diversity action, Erik Gundacker appeals the district court's grant of summary judgment to Unisys Corporation on his retaliation claim under the Minnesota Whistleblower Act, Minn. Stat. Ann. 181.931-937 (West Supp. 1998), and the district court's finding that a document inadvertently disclosed to Unisys during discovery was privileged and had to be returned. As part of this consolidated appeal,

Gundacker and his attorney, Dale Nathan, also challenge the district court's decision to assess sanctions against them. We affirm the district court's grant of summary judgment and finding that the inadvertently disclosed document was privileged, reverse any sanctions levied against Gundacker, and remand for a proper determination of monetary sanctions against Nathan.

I.

For several years, Gundacker worked as a software manager in Unisys' defense business. When Gundacker was forty-two-years old, Unisys laid Gundacker off during a company-wide reduction in force (RIF). According to Gundacker, during the course of his employment with Unisys, he protested what he considered to be illegal orders by the company. Specifically, Gundacker contends that Unisys ordered or asked him to: (1) make illegal charges in a naval contract; (2) arbitrarily increase a price estimate in a naval contract; (3) submit unrealistically low bids in a naval contract; (4) begin work on a project before receiving naval approval; and (5) illegally use replacement personnel as part of a government contract when it started layoffs in November 1993.

In November 1993, when Unisys began conducting involuntary layoffs it required Gundacker's supervisor, Judith Groff, to rank employees according to the skills necessary to complete existing and future projects. After assessing Gundacker, Groff concluded that of those within Gundacker's grade position, laying off Gundacker would have the least impact. Gundacker claims that within the same comparison group, his performance review went from a 12/37 (i.e., 12th best of 37 employees) to 37/37. On December 14, 1993, Unisys relieved Gundacker of some of his managerial responsibilities.

On January 24, 1994, Unisys laid Gundacker off. Shortly before his termination, Gundacker claims that Groff wrote an internal note evidencing that Unisys fired Gundacker because he protested Unisys' allegedly illegal activity. The handwritten note stated:

> Prior to 15 Nov RIF - about Nov. 5 - [Gundacker] sent a letter to a number of people (Jerry, Judy, Huff, ?) Stating that the people on layoff were critical & shouldn't be let go. Caused a ruckus through Bill, etc. with the last minuteness of it. Upshot was, he was relieved of his mgm't responsibilities during week of Nov. 15 & resisted the acceptance until meeting in Dec. -- Talked to Jerry about being on probation, etc.

(Appellant's App. at 105.)

Soon after he was laid off, Gundacker brought suit against Unisys alleging that Unisys retaliated against him for protesting illegal activity. At the beginning of discovery, Unisys' lawyers inadvertently released a document to Nathan. The document contained information related to an internal investigation conducted by Unisys' lawyers to determine, in part, whether Unisys participated in illegal conduct. Upon realizing their mistake, the attorneys asked Nathan to return the document. They claimed that the document was privileged attorney work product and asked that Nathan not use it. Several days after Nathan gave the document back, Unisys' lawyers asked Nathan whether he had retained a copy.
He refused to answer, and Unisys again asked Nathan to return the original and all other copies. Nathan wanted to use the document as part of a separate whistleblower claim, known as a qui tam action, against Unisys. The magistrate

determined that the document was privileged as attorney work product. The district court agreed with the magistrate's conclusion.

After the parties agreed to a confidentiality stipulation, on January 9, 1995, the magistrate entered a protective order. Nathan repeatedly disregarded the order. For example, despite the fact that the separate qui tam action against Unisys was sealed entirely, Nathan continually referred to the qui tam action as part of Gundacker's pleadings in this case.

While Gundacker was working at Unisys, he took several cartons of internal company documents and retained several other documents that were given to him in the course of his employment. Unisys brought a counterclaim against Gundacker requesting that all documents be returned, and that
Nathan be prohibited from disclosing any information from the documents. On April 11, 1997, the parties agreed that Unisys would dismiss its counterclaim against Gundacker. Gundacker, in turn, agreed to return all Unisys documents in his possession. The parties agreed that the documents would be coded, supervised by a third party, and stored at Unisys' lawyers office with the only key placed under seal in the court file.

Under the agreement, Nathan could review documents relevant to this case, but the documents would remain under seal. Further, if Gundacker ultimately lost on appeal, Unisys would take possession of the documents. However, if Gundacker succeeded on appeal, Gundacker could seek a court order allowing him to use the documents. All parties agreed that because of the settlement agreement, Unisys' pending motion for a temporary restraining order was moot.

Nevertheless, shortly after the parties reached their settlement agreement, Nathan sent a letter to Unisys claiming that the agreement did not prevent him from sending documents to law enforcement officials. The magistrate requested that the parties be available for an April 18, 1997 telephone conference call. On April 17, 1997, Nathan sent a letter to Unisys' lawyers indicating that he would tape the telephone conference call and possibly have the media present. He also stated that he reserved the right to provide copies of the tape and letters from Unisys' attorneys to federal officials, the Lawyers Professional Responsibility Board, and the media.[1] Nathan wrote:

> Nothing less than a written order not under seal by a judge specifically prohibiting me from providing copies of the Gundacker documents to the United States Government will prevent me from providing these documents to the United States Government if we decide to do so. We will obey such an order if it is issued. We will also appeal that order.

(Appellee's App. at 55.)

Nathan also stated that the various judges assigned to this case were part of a cover-up and were impeding a federal investigation. On April 21, 1997, the magistrate convened a meeting between the parties to discuss the court records remaining under seal. Unisys' lawyers were concerned that Nathan would turn documents over to the United States Attorney. Nathan stated that he would only do so if he were subpoenaed but he would not ask for a subpoena. He

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[1] The record indicates that Nathan did, in fact, speak to at least one member of the press about this case and the separate qui tam action.

specifically asked that the record show he would not request a subpoena, and assured Unisys that if he were subpoenaed, he would first contact Unisys.

After the conference, however, Nathan contacted an Assistant United States Attorney (AUSA) and told him about the conversation with the magistrate. The AUSA served Gundacker with a subpoena. Relying on Nathan's advice, Gundacker complied with the subpoena. Despite his assurances to the contrary, Nathan turned over the documents without first contacting Unisys, stating that he forgot the court's order and inadvertently made a mistake.

Because of their conduct, the district court assessed sanctions against Nathan and Gundacker. The district court found that Gundacker and Nathan acted in bad faith in relation to the Federal Rule of Civil Procedure 16 settlement conference and vexatiously and unreasonably multiplied the proceedings under 28 U.S.C. 1927. The court then determined that sanctions against the two were appropriate.

In sum, the district court granted Unisys' summary judgment motion on Gundacker's whistleblower claim; found that the inadvertently disclosed document was privileged under the attorney work product doctrine; assessed $11,247.06 in sanctions against Gundacker and Nathan, holding them jointly liable; and assessed $6,111.07 in sanctions against Nathan, individually, to reimburse Unisys for certain fees and costs. The district court also ordered that Nathan be publicly admonished in an order to be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility. Gundacker and Nathan appeal.

II.

Gundacker appeals the district court's grant of summary judgment to Unisys and its finding that the inadvertently disclosed document was privileged. Both Gundacker and Nathan appeal the assessment of sanctions.

We review a district court's grant of summary judgment de novo. United States ex. rel. Glass v. Medtronic, Inc., 957 F.2d 605, 607 (8th Cir. 1992). In considering whether to grant summary judgment, a curt examines all the "pleadings, depositions, answers to interrogatories . . . admissions on file . . . [and] affidavits." Fed. R. Civ. P. 56(c). After viewing the record in a light most favorable to the nonmoving party, summary judgment is appropriate only where there is "no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Langley v. Allstate Ins. Co., 995 F.2d 841, 844 (8th Cir. 1993) (citations omitted).

Gundacker first argues that Unisys retaliated against him in violation of 181.932, subd. 1(c)[2] of the Minnesota Whistleblower Act:

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[2] Gundacker argues that in addition to his 1(c) claim, he also alleged a 1(a) claim under the Minnesota Whistleblower Act. Subdivision 1(a) provides:

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> . . . .
>
> (a) the employee, or a person acting on behalf of an

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> . . .
>
> (c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

Minn. Stat. Ann. 181.932, subd. 1(c) (West Supp. 1998).

In determining whether an employee has been subjected to a rtaliatory discharge, Minnesota courts follow the three-part, burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[3]

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> employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.

Minn. Stat. Ann. 181.932, subd. 1(a) (West Supp. 1998). Having reviewed his original complaint and several amended complaints, we conclude that Gundacker only brought suit under 1(c). Despite this issue being flagged early in the proceedings, Gundacker never asked for leave of court to amend his complaint in order to add a claim under subd. 1(a) and he has not appealed this issue.

See Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983) (citations omitted). In order to make out a prima facie case of retaliation, Gundacker must prove: (1) he engaged in conduct that is protected by the statute, (2) Unisys took adverse employment action against him, and (3) a causal link between the adverse employment action and the conduct protected by the statute. Id.

Gundacker alleged five incidents in which he protested illegal orders. In discussing why Gundacker failed to establish a prima facie case as it relates to the first four incidents of alleged illegal activity, the district court stated:

> Plaintiff has produced no evidence . . . tending to show the [first two] incidents were a factor in his termination. . . .Even if [the] evidence [as to the third and fourth incidents] were sufficient to create a genuine issue of material fact on the causation element of plaintiff's prima facie case, the Court notes plaintiff has not shown that his actions during these two incidents are protected by the whistleblower statute. With respect to the bid, plaintiff provided no evidence he informed Unisys the low bid was illegal. He also admitted he submitted the bid, and therefore cannot show he refused the allegedly illegal order to submit it. See Minn. Stat. 181.923, subd. 1(c).

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[3] Unisys argues that rather than review Gundacker's claim as simply one of retaliation, we should analyze his cause of action under the more exacting standard applied in RIF cases. We need not address this issue because under either mode of analysis, Gundacker is unable to establish a prima facie case of retaliation.

> The evidence with respect to the work authorization issue shows plaintiff brought the problem to the attention of his superiors and the work authorization was changed to his satisfaction. Management's response to his complaint takes this incident outside the whistleblower statute. See Morrow v. Air Methods, Inc., 897 F. Supp. 418, 421 (D. Minn. 1995) (no request to perform illegal act where management acknowledged and corrected the error employee brought to his attention).

Gundacker, No. 4-95-676, Mem. & Order at 6-7 & n.3. Having carefully reviewed the record, we agree with the district court's analysis Concerning the first four incidents.

With respect to the fifth incident, Gundacker sent a letter to his supervisor complaining that the proposed layoffs would adversely affect his ability to complete projects under his direction. Gundacker claims that Unisys told him to use substitute personnel in place of those laid off. He asserts that he complained to Unisys that doing so would be illegal. To support his assertion, Gundacker submitted expert testimony to the effect that the following actions violate state and federal law: (1) using lower grade personnel under a government contract without first advising the government, (2) charging the government for deliveries when a contractor knows the
work is incomplete or of a lower quality, and (3) billing "direct charge worker" costs to overhead. Despite the introduction of expert testimony, the district court concluded that because Gundacker did not refuse Unisys' order, as required by subd. 1(c) of the whistleblower act, he failed to establish a prima facie case. We agree.

In his deposition and supplemental memorandum opposing summary judgment, Gundacker admitted that he used people that were not originally bid for the particular task and that he "used other personnel under protest because there was no other option." In his appellate brief, Gundacker stated that "he had no choice but to use replacement personnel." Because Gundacker did not refuse Unisys' order to use substitute personnel, the district court properly granted summary judgment in favor of Unisys.

Gundacker next argues that because the crime-fraud exception applied, the district court erred by determining that the inadvertently disclosed document was privileged under the attorney work product doctrine. We review the district court's determination that a document is privileged as attorney work product for an abuse of discretion. See Zar v. South Dakota Bd. of Exam'rs of Psychologists, 976 F.2d 459, 463-64 (8th Cir. 1992).

The work product privilege operates to ensure that an opponent cannot secure materials that an adversary has prepared in anticipation of litigation. Pittman v. Frazer, 129 F.3d 983, 988 (8th Cir. 1997) (citation omitted). The doctrine
allows for discovery of ordinary work product[4] when there is a demonstrated substantial need and an inability to otherwise procure the relevant material without undue hardship. See id. (citations omitted). In rare circumstances, a party opponent is permitted to discover opinion work product.[5]

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[4] Ordinary work product includes such items as photographs and raw information. See Pittman, 129 F.3d at 988 (citations omitted).

[5] Opinion work product includes conclusions, mental

See id. (citations omitted). Although disclosure to an adversary ordinarily waives work product protection, there must be an intention that the opposing party see the work product. see id. (citations omitted).[6] Under the crime-fraud exception, "[a]ttorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal fraud or scheme." In re Berkley & Co., 629
F.2d 548, 553 (8th Cir. 1980) (citations omitted).

Unisys claims that the inadvertently disclosed document was generated as part of an internal investigation and that the data contained within the document was otherwise readily discoverable. Unisys also claims that, at most, the document was evidence of an alleged past crime or fraud and was produced, in part, to investigate Gundacker's claims in anticipation of litigation.[7] Having carefully reviewed the record, we hold that the district court did not abuse its discretion in finding that the document was privileged under the attorney work product doctrine; that the crime-fraud exception does not apply; and that Gundacker should have obtained the

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impressions, opinions, and legal theories concerning the litigation. See Pittman, 129 F.3d at 988 (citations omitted).

[6] Both parties agree that the document was ordinary work product and inadvertently disclosed.

[7] There is also evidence in the record suggesting that Unisys generated the document as part of a voluntary compliance program with the Department of Defense's Criminal Investigative Service.

information he sought through the normal channels of discovery.[8]

Finally, Gundacker and Nathan appeal the district court's assessment of sanctions. Because a notice of appeal had already been filed in this case, we must first determine whether the district court had jurisdiction to assess sanctions. Generally, a notice of appeal divests the district court of jurisdiction. See Liddell v. Board of Educ., 73 F.3d 819, 822 (8th Cir. 1996) (citations omitted).

Nevertheless, because the issue of sanctions was not before this court at the time Gundacker originally appealed, the district court properly decided whether sanctions were appropriate. See Perkins v. General Motors Corp., 965 F.2d 597, 599 (8th Cir. 1992) (citations omitted) (because sanctions are collateral to the merits of the case, sanctions may properly be considered by the district court even when the merits are no longer before it).

The district court assessed sanctions under 28 U.S.C. 1927 and Federal Rule of Civil Procedure 16(f), which we review for an abuse of discretion. See Hill v. St. Louis Univ., 123 F.3d 1114, 1121 (8th Cir. 1997) (citation omitted). Under 1927, we must determine whether the district court abused its discretion in making the objective finding that Nathan unreasonably and vexatiously multiplied

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[8] Shortly before oral argument, Nathan filed a motion seeking to compel Unisys to disclose whether it provided the government with a copy of the inadvertently disclosed document. In light of the above discussion, we deny Nathan's motion.

the proceedings.[9] See O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987).

Under Rule 16(f),[10] we must decide whether, in assessing sanctions, the district court abused its discretion in

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[9] Under 1927,

> [a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. 1927.

[10] Rule 16(f) states:

> If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion, or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule (b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an

finding that Gundacker and Nathan failed to obey a pretrial order and generally failed to participate in good faith. We must also determine whether, in exercising its inherent powers, the district court appropriately assessed punitive sanctions against Gundacker and Nathan under Rule 16(f).

The record is clear that Nathan unreasonably and vexatiously multiplied the proceedings and generally acted in bad faith. He disobeyed court orders, violated his duty as an officer of the court by making false representations, spoke to at least one member of the press concerning this and an ongoing, sealed qui tam action, and made various threats directed at the court. The assessment of sanctions against Nathan was certainly appropriate.[11]

We are not convinced, however, that Gundacker should be sanctioned because of Nathan's reckless behavior. Having carefully reviewed the record, we believe that it was an abuse of discretion to assess sanctions against Gundacker. At worst, Gundacker did not prevent his lawyer from acting recklessly, and we will not impute liability to Gundacker because his attorney decided to "run wild."

III.

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award of expenses unjust.

Fed. R. Civ. P. 16(f).

[11] In light of the above discussion, we also conclude that the district court did not abuse its discretion in ordering that Nathan be publicly admonished in an order to be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility.

We affirm the district court's grant of summary judgment and finding that the inadvertently disclosed document was privileged, reverse any sanctions levied against Gundacker, and remand for a proper determination of monetary sanctions against Nathan in light of our above discussion.[12]

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[12] Because Nathan and Gundacker are no longer jointly liable for the sanctions assessed against them, the district court should determine what level of sanctions against Nathan are appropriate. We note that we do not disturb the district court's individual assessment of costs and fees against Nathan to be paid to Unisys under 28 U.S.C. 1927.

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA
FOURTH DIVISION

ERIK GUNDACKER,
Civil File No. 4-95-676 (JRT/IGL)
Plaintiff,

REPORT AND RECOMMENDATION
UNISYS CORPORATION,
FILED UNDER SEAL
Defendant. -

APPEARANCES

Filed: March 12 ,1996
Mr. Dale C. Nathan, Esq., of Nathan & Associates, Attorneys at Law, 3600 Kennebec Drive, Eagan, MN 55122-1039, for Plaintiff and himself

Mr. Thomas M. Sipkins, Esq., and Mr. Joseph G. Schmitt, Esq., of Halleland, Lewis, Nilan, Sipkins & Johnson, P.A., Pillsbury Center South, Suite 600, Minneapolis, MN 55402-450 1, for Defendant.

Erik Gundacker claims his former employer, Unisys Corp., wrongfully termiintated him based on his age and his whistleblowing activities, and that Unisys libeled him in documents submitted to the United States navy. Unisys cllaims that Gundacker was terminated was terminated in a bona fide reduction in workforce. The matter is currently before the Court on defendant's motion for summary judgment and defendant's motion to dismiss plaintiff's complaint under rule 41(b) for alleged violations of court orders by plaintiff's counsel. For the reasons set forth below, the Court grants defendant's motion for summary judgment. Defendant's ule 41(b) moiton is therefore denied as moot.

BACKGROUND

Gundacker worked for Unisys in its defense business area as a software manager. At the time of his layoff, Gundacker was 42 years old in support of his Whistleblower claim, Gundacker describes five separate incidences during his employment with Unisys in which he claims he protested alleged illegal activities by the company. First, Gundacker alleges that Unisys improperly ordered him to charge unnecessary costs for use of VAX computers to a Navy contract which he managed. Second, he claims he was ordered to increase the cost estimate for a project, the "C2P rehost," in order to mislead the Navy into believing a Unisys product was competitively priced. Third, he alleges that some time during 1993, he was directed to submit unrealistically low bids to the Navy. Fourth. he alleges that he was ordered to begin work on a project before it was approved by the Navy. Fifth,, in November, 1993, Gundacker sent a letter to his supervisor complaining of the impact of proposed layoffs on his ability to complete projects under his management. He claims he was then told to use substitute personnel in place of the individuals to be laid off, and he complained that doing so would be illegal. After the individuals were laid off, Gundacker used substitute personnel on the project. He was relieved of some of his management responsibilities on December 14, 1993.

Gundacker has not contested the essential facts submitted by Unisys regarding his layoff. In late November and December of 1993, Unisys began to plan for an involuntary reduction in force in plaintiffs area. Gundacker's immediate supervisor at that time was Judith Groff. Groff was instructed to rank her employees according to the skills necessary to complete existing and future projects. Groff evaluated all of the employees in her area and drafted a

memorandum stating that, of the employees in Gundacker's grade, Gundacker was the employee whose layoff would have the least impact on Unisys' ability to complete its existing and future projects. Groff s choice of Gundacker for layoff was approved by her supervisor and he was laid off on January 24, 1994. Of the individuals who were evaluated with Gundacker and were retained, only one, Rich Howey, was younger than ho. Rowey was 40 years old, had more years of service with Unisys, and was ranked higher than Gundacker in evaluations.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Under that rule:

> [Summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. *See Anderson* **it** *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Initially, the movant bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322 (1986). In evaluating the movant's showing, the evidence offered by the non-moving party is to be believed and all justifiable inferences therefrom are to be drawn in the light most favorable to that party. *Matsushita Elec. Indus. v. Zenith Radio,* 475 U.S. 574, 587 (1986). Where a moving

party makes and supports a motion for summary judgment in accordance with Rule 56, a party opposing the motion may not rest upon the allegations or denials of its pleadings; rather, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 256; *Krenik v. County of Le Sueur*, 47 F.3 d *953*, 957 (8th Cir. 1995). Accordingly, the nonmovant "must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial,'" *Wilson v. Southwestern Bell Telephone Co.*, *55* F.3d 399,405 (8th Cir. 1995).

ANALYSIS

I. Whistleblower claims.

Plaintiffs complaint states a claim under Minn. Stat. § 181.932, subd. 1(c),' which provides:

> An employer shall not discharge . . . an employee . . . because:
>
> > (c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee iinforms the employer that the order is being refused for that reason.

In evaluating retaliatory discharge claims, Minnesota courts follow the three-part analysis set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hubbard v. United Press Int'l* 330 N.W.2d 428 (Minn. 1983) (retaliatory discharge claim); *Phipps v. Clark Oil & Refining Corp.*, 408 *N.W.2d* 569 (Minn. 1987) (whistleblower claim).

To establish a prima facie case of retaliation, plaintiff must prove: (1) he engaged in conduct protected by statue; (2) adverse employment action by the employer; and (3) a causal link between the two. *Hubbard,* 330 N.W.2d at 444•2 If plaintiff establishes a prima facie case, the burden of production shifts to defendant to articulate a legitimate reason for the discharge. To prevail, however, plaintiff must prove by a preponderance of the evidence that the discharge was for an impermissible reason. *Phillipps,* 408 N.W.2d at 572. A plaintiff may prevail if an illegitimate reason "more likely than not" motivated the discharge decision. *McGrath* v. *TCF Bank Savings,* 509 N.W.2d 365 (Minn. 1993).

After careful consideration of each incident, the Court finds that *plaintiff* has not established a prima facie case through any of the five incidents he describes. The Court finds plaintiff has produced insufficient evidence of a causal link between four of the incidents and Groffs decision to terminate plaintiff With respect to two of these incidents, plaintiff has produced no evidence that Groff even knew of any of these incidents, let alone any evidence tending to show that Groffs decision was affected by the incidents. With respect to two other incidents, the record shows some minimal evidence that Groff may have known of plaintiffs activity, but plaintiff has not produced any evidence that Groff's decision was affected by that knowledge. With respect to the most recent incident, plaintiff produced some evidence of causation, but did not show that his activity was protected by the whistleblower statute. Plaintiff therefore has not made out a prima facie case of retaliatory discharge with respect to any of the five incidents.

The first two incidents were remote in time *from* plaintiffs layoff. Plaintiffs Complaint does not date his complaints about improper VAX charges, but in his

deposition, plaintiff dated the problem to "the late 80's and early 90's." Documents and deposition testimony submitted by both parties indicate that any such complaints probably occurred, if at all, in 1991. Plaintiffs Complaint similarly fails to state the date of his alleged complaints about the cost estimate for the "C2P" proposal to the Navy. Documents and deposition testimony submitted by plaintiff indicate that the incident occurred in 1992. These two incidents therefore took place one to three years before plaintiffs layoff Plaintiff has produced no evidence indicating that Croft the decision-maker with respect to his layoff *knew* about these incidents, or any evidence tending to show the incidents were a factor in his termination.

Plaintiff also claims that at some time during 1993, he was ordered to submit an unrealistically low bid to the Navy. Plaintiff alleges another whistleblowing incident occurred when he was ordered to begin work on a project before it was approved by the Navy. The document containing the work authorization about which plaintiff complained is dated June 23, 1993. Defendant argues that there is absolutely no evidence Groff knew about these incidents. Plaintiff does not point the Court to any evidence of Groff's knowledge of these incidents, but the Court notes some reference to Groff in plaintiffs deposition testimony about them. Plaintiff testified he told Groff the bid was unrealistic. Gundacker Deposition. p. 232. Plaintiff also testified he told Groff and others that the work authorization asked him to do something illegal. He stated that Groff said nothing, just "shrugged her shoulder," and that he kept "pressing it." Gundacker Deposition, p. 213. While plaintiff's testimony, if accepted as true, shows some evidence Groff knew about these incidents during 1993, it does not link that knowledge to Groff's decision to terminate him in January, 1994, and plaintiff has not argued that it does.[3]

The only incident for which there is any evidence of causation is the "substitution of personnel" incident which occurred closest in time to plaintiffs termination. The "substitution of personnel" incident involved a memorandum plaintiff sent to his supervisor, Judith Groff, on November 4, 1993, in which he stated that employees who worked for him and who were scheduled for layoff were "critical to the performance of the contract and must remain on the contract in order to meet the schedules within the budget. If schedules/budgets are not met the company may become liable." Plaintiff claims in his deposition that he "questioned Judy Groff Gerry Osieki and Linda Thiery about the legality of substitution of personnel." He states that he was then "'told to use substitute personnel and charge them to the program or overhead, both of which are illegal and fraudulent," and that as a result of the personnel changes, several deliveries by Unisys were "'incomplete, missing, or of poor quality." Plaintiff testified that he was "strongly recommended to use substitute personnel," and that this was synonymous with being ordered to do so. He stated that he told Osieki it was illegal "right on the spot."

Plaintiff also presented some evidence that he had an objective basis for his belief that the alleged order was illegal. In his deposition testimony, plaintiff stated that "[c]hanging personnel without notifying the Navy . . . is illegal. Plaintiff also submitted an expert opinion that it would violate various federal statutes or regulations: (1) to use lower grade personnel to perform work under a government contract without advising the government and obtaining a contract change; (2) to charge the government for deliveries the contractor knows are incomplete, missing or of less than the desired quality; or (3) to charge a "direct charge worker" to overhead.

As evidence that this incident caused his termination plaintiff points to a handwritten note he alleges was written by his supervisor, Judith Groff about plaintiff, stating in pad:

> Prior to 15 Nov RIF - about Nov. *5* - he sent a letter to a number of people (Jerry, Judy, Huff, *?)* Slating that the people on layoff were critical & shouldn't be let go. Caused a ruckus through Pill, etc. with the last minuteness of it. Upshot was, he was relieved of his mgm't responsibilities during week of Nov. 15 & resisted the acceptance until after meeting in Dec. -Talked to Jerry about being on probation, etc.

Plaintiff was relieved of some of his management responsibilities on December 14, 1993. He was terminated on January 24, 1994.

Assuming plaintiff could show Groff was the author of this note, and the inference was drawn from it that plaintiffs complaint about layoffs was a factor in his termination, plaintiff nevertheless has failed to state a prima facie case because he has not shown that his activity was protected under the whistleblower statute. Minnesota Statute § 181.932, subd. 1(c) requires that the employee "refuse an employer's order to violate the law." Taking all of plaintiffs allegations as true, plaintiff has not shown that he refused to follow the alleged order. He admitted in his deposition that he did use "people that were not originally bid for that particular task, but were in the TAR." In his supplemental memorandum, plaintiff states that he "used other personnel under protest because there was no other option." With the latter statement, plaintiff implicitly concedes he took the action he claims was illegal.

At argument, plaintiffs counsel also conceded that plaintiff had used other personnel, but claimed that plaintiff had never "accepted" the substitute personnel. That appears to be a distinction without a difference. Plaintiff has not demonstrated that he refused an employer's order to violate the law. As a result, he has not shown that his conduct was protected by the whistleblower statute.

Further, even if plaintiff could make out a prima facie case through any of the five incidents, summary judgment on the whistleblower claims would still be appropriate because plaintiff cannot sustain his ultimate burden of persuasion. If plaintiff established a prima facie case, the burden of production would shift to defendant to state a legitimate reason for terminating plaintiff Unisys has submitted two affidavits by Judith Groff which state that plaintiff was selected because he was the least qualified person to perform the remaining work in his area. The second Groff affidavit refers to attached documentation containing the detailed analysis she used to select plaintiff at the time of the layoff The documentation contains no reference to plaintiff's alleged whistleblowing activities.

Once defendant proffered this legitimate reason for the layoff, plaintiff would need rebut the stated reason for the layoff and show that it was a pretext for retaliation. Plaintiff did not depose Groff or present any evidence tending to show that her contemporaneous explanation for plaintiffs termination was a pretext for retaliation. Given the strength of defendant's documentation of its proffered legitimate reason, plaintiff has not produced evidence such tat a reasonable jury could find he had met his ultimate burden of proving that Groff s stated and documented reason for choosing him was a pretext.

II. Age discrimination claim.

Age discrimination claims where there is no direct evidence of discrimination are also analyzed using the *McDonnell-Douglas* burden-shifting framework. *Krenick* v. *County of LeSeur*, 47 F.3d 953 *(8th Cir.* 1995); *Dietrich v. Canadian Pacific*, 536 N.W.2d 319 (Minn. 1995). In a typical age discrimination case analyzed under the *McDonnell Douglas* framework, the plaintiff must show: (1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, and (4) that after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications.

*In Holley v. Sanyo Manufacturing*, 771 F.2d 1161 (8th Cir. 1985), the Court modified the elements of an age discrimination plaintiffs prima facie case when the termination is the result of a reduction-in-force. The Court recognized that in the reduction-in-force context, a plaintiff would easily meet elements one through three, but would never meet the fourth element because the plaintiffs position would have been eliminated or merged with other positions. The Court required plaintiffs in reduction-in-force cases to come forward instead with "additional evidence that age was a factor in [plaintiffs] termination in order to establish a prima facie case." *Holley*, 771 F.2d at 1166. "This further showing could take many forms, [including] . . . statistical evidence, . . . or circumstantial evidence, . . . [and courts should] not be rigid in . . . consideration of the evidence of discrimination a plaintiff may offerDefendant has submitted an affidavit by a statistician who analyzed the selection of plaintiff as the candidate for layoff and compared his age to the ages

For purposes of its summary judgment motion, Unisys has conceded that plaintiff has met elements one through three of the *McDonnell Douglas* test. Plaintiff has conceded that he was laid off as part of a bona fide reduction in force. Therefore, the only issue before the Court is whether plaintiff has presented sufficient evidence of the "further showing" required by *Holley* Under *Holley,* he must present evidence of some form that age was a factor in his termination. Plaintiff has not produced any such evidence.

Defendant has submitted an affidavit by a statistician who analyzed the selection of plaintiff as the candidate for layoff and compared his age to the ages of several groups of Unisys employees. Defendant's expert compared plaintiff to the group with which Groff compared plaintiff in her evaluations, to a group of "Tess senior" employees plaintiff claimed should have been laid off instead of him, to both of those groups combined, and to a list of all employees at plaintiffs level under Judith Groff's supervision. The expert concluded there was no statistical evidence that age played a factor in plaintiffs layoff under any of his comparisons. In fact, in each of the first three groups, there was only one person younger than plaintiff

In addition, Unisys has submitted documents containing Groff's layoff analysis. The documents show *Groff* determined that plaintiff had the least valuable skills for the remaining work in his area. Plaintiff has not rebutted that documentation with any specific facts showing that he was more qualified than even the one younger employee retained, Rich Howey. He has not rebutted defendant's claim that Howey had mere years of service with Unisys than plaintiff and was ranked higher than plaintiff in all evaluations produced. He also acknowledged in his affidavit that his peers were more qualified than he with respect to their own work.

In sum, plaintiff has not met his burden of producing some additional evidence that age was a factor in his layoff Given the lack of evidence in the record supporting an inference that age may have played a role in plaintiffs layoff defendant's motion for summary judgment must be granted on plaintiffs age discrimination claim.

III. Libel claim.

Plaintiff failed to respond to defendant's arguments with respect to his libel claim. Where a moving party makes and supports a motion for summary judgment, the party opposing the motion may not rest upon the allegations or denials of its pleadings; rather, the nonmovant must **"set** forth specific facts showing that there is a genuine issue for trial.' *Liberty Lobby,* 477 U.S. at 256. Plaintiff has failed to do so and has not made a sufficient showing on the essential elements of a libel claim for which he has the burden of proof at trial. *See Wilson v. Southwestern Bell Telephone Cc.,* 55 F.3d at 405. Plaintiff has not met his burden in opposing defendant's motion for summary judgment.

The Court is aware that plaintiff has made significant allegations of fraud in Unisys' contracts with the *Navy.* This decision in no way reflects on the merits of those claims.

ORDER

Accordingly, based on the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that defendant's motion for summary judgment [Docket No. 143] is GRANTED and Defendant's motion for Rule 41 sanctions and to dismiss [Docket No. 228] is DENIED.

Dated: March 12, 1996.
JOHN R. TUNHEIM

Footnotes

1 In his opposition to defendant's motion for summary judgment, plaintiff has referred to subdivision 1(a) of the same statute. Plaintiffs complaint did not include a claim under that subdivision, and plaintiff has not moved to amend his Complaint; therefore, the Court has evaluated his claim only under subdivision 1(c) of the statute.

2 The importance of causation evidence to this case is *clear*. *Hubbard's* requirement of a "causal link" mirrors the causation element implicit in the whistleblower statute's requirement that an employee be fired "because" he refused an order to perform an act he had an objective basis to believe *was* illegal and reported that to his employer. *See* Minn. Stat. § 181.932, subd. 1(c).

3 Even if this evidence were sufficient to create a genuine issue of material fact on the causation element of plaintiffs prima facie case, the Court notes plaintiff has not shown that his actions during these two incidents are protected by the whistleblower statute. With respect to the bid, plaintiff provided no evidence he informed Unisys the low bid was illegal. He also admitted he submitted the bid, and therefore cannot show he refused the allegedly illegal order to submit it. *See* Minn. Stat. § 181.923, subd. 1(c).

4 The evidence with respect to the work authorization issue shows plaintiff brought the problem to the attention of his superiors and the work authorization was changed to his

satisfaction. Management's response to his complaint takes this incident outside the whistleblower statute. *See Morrow v. Air Methods, Inc., 897* F. Supp. 418,421 (D. Minn. 1995) (no request to perform illegal act where management acknowledged and corrected the error employee brought to its attention).

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

FOURTH DIVISION

ERIK GUNDACKER,
Civil File No. 4-95-676 (JRT/IGL)
Plaintiff,

REPORT AND RECOMMENDATION
UNISYS CORPORATION,
FILED UNDER SEAL
Defendant. -

APPEARANCES

Filed: 8/25/97
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Mr. Thomas M. Sipkins, Esq., and Mr. Joseph G. Schmitt, Esq., of Halleland, Lewis, Nilan, Sipkins & Johnson, P.A., Pillsbury Center South, Suite 600, Minneapolis, MN 55402-450 1, for Defendant.

JONATHAN LEBEDOFF, United States Magistrate Judge

The above-entitled matter came on for hearing before the undersigned Magistrate Judge on luly 2,1997, on Defendant's motion for sanctions pursuant to 28 United States Code § 1927 and Federal Rule of Civil Procedure 16(f). Defendant seeks slightly in excess of $22,000 in sanctions, to be imposed on Plaintiff and his counsel, Mr. Nathan.

At the hearing on this matter, the Court's jurisdiction to address this motion was raised. At issue were both the fact that a notice of appeal had been filed in the case and the type of motion at issue, *i.e.*, the type of decision to be issued on this motion.

As to the Court's jurisdiction, it is clear that generally the filing of a notice of appeal divests a district court of jurisdiction. Liddell by Liddell v. Board of Education, 73 F.3d 819, 822 (8th Cir 1996) ("as a general rule, a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously"). However, this loss of jurisdiction is limited to the issue on appeal. Harmon v. United States, 101 F.3d 572, 587 (1996) (where the issue to be addressed by the district court is not before the court of appeals pursuant to the notice of appeal, the district court may consider the issue). Further, sanctions are collateral to the merits of the case and collateral issues may be considered by this Court even if the merits are no longer pending before it. Perkins v. General Motors Corp., 965 F.2d 597, 599 (8th Cir. 1992). Because the issue of sanctions is not before the Eighth Circuit Court of Appeals, see Plaintiffs Notice of Appeal [Docket No. 348], the issue is properly addressed in the District Court.

As to magistrate judges' authority to issue orders addressing motions for sanctions, a conflict exists in the circuits. Compare Maisonville v. F2 America, Inc., 902 F.2d 746, 748 (9th Cir. 1990) (magistrate judges have authority to impose sanctions under Fed. R. Civ. P. 11) with Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 868 (7th Cir.), cert. denied U.S. ___, 117 S. Ct. 305 (1996) (magistrate judges do not have authority to award sanctions

under either Fed. R. Civ. P. 11 or 28 U.S.C. § 1927); and Bernett v. General Caster Service of N. Gordon Co., 976 F.2d 995, 997-98 (6th Cir. 1992) (magistrate judges do not have authority to order sanctions under Fed. R. Civ. P. 11). The United States Court of Appeals for the Eighth Circuit has not addressed the issue.

At least one magistrate judge in the Eighth Circuit has issued a sanctions order, imposing sanctions pursuant to Federal Rule of Civil Procedure 11. See Robinson v. Eng, 148 F.R.D. 635 (D. Neb. 1993) (Piester, M.J.). However, the undersigned notes that many decisions by magistrate judges apparently issued in the District of Nebraska as orders would be issued as reports and recommendations in this District.[1]

Without precluding that the undersigned would, in *fact*, have authority to decide the motion by order, this Court will join the ranks of those magistrate judges who have issued reports and recommendations to address the type of motion at hand.[2]

## II. DISCUSSION

### A. Sanctions

#### 1. Standard of Review Under 28 U.S.C. § 1927.

> [a]ny attorney or other person admitted to conduct cases in any court of the United States ho so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

fees reasonably incurred because of such conduct.

This rule has been invoked *for* numerous actions or lack thereof by counsel, including without limitation the making of unsupported factual allegations, misrepresentations, failure to disclose discovery, the filing of frivolous motions, and refusals to obey court orders. See Perkins, 965 F.2d at 600-602; Platt v. Cooper, 959 F.2d 91(8th Cir. 1992); and EEOC v. Milavetz & Associates, P.A., 863 F.2d 613 (8th Cir. 1988). Exercise of the powers conferred by this statute is conditioned on a finding of objective bad faith. O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987).

Under Federal Rule of Civil Procedure 16, courts may in any action in their discretion direct the attorneys for the parties and any unrepresented parties to appear before such court for a conference or conferences before trial for various purposes, including, specifically, to facilitate the settlement of the case. Fed. R. Civ. P. 16(a)(5). Under Rule 16(c), courts may take appropriate action at any such conference with respect inter alia to settlement and the use of settlement procedures to assist in resolving the dispute. Finally, under Rule 16(f), if a party or a party's attorney fails to obey a scheduling or pretrial order, is substantially unprepared to participate in the conference, or fails to participate in good faith, the judge may make such orders with respect thereto as are just, including any of the orders as provided for by Fed. R. Civ. P. 37(b)(2)(B), (C), and (D). In lieu of or in addition to any other sanction, Rule 16(f) provides that the judge shall require the party, the party's attorney, or both to pay the reasonable expenses incurred because of the noncompliance, including attorney's fees, unless the judge finds that noncompliance substantially justified or if the circumstances make an award of expenses unjust. As the comments to the 1983 amendments make clear,

intention to encourage forceful judicial management. Further, the imposition of sanctions may be sought by either the court or by one of the parties. Finally, the sanction of contempt is specifically referenced through the incorporation into Rule 16(f) of Rule 37(b)(2)(D).

Of course, in addition to the powers set forth in Fed. R. Civ. P. 16 and 28 U.S.C. § 1927, the Court has an inherent power to sanction parties and their counsel for abusive litigation tactics. See Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Exercise of the Court's inherent powers must be preceded by a finding of subjective bad faith. Roadway Express, 447 U.S. at 766-67.

Awards based on any of the above grounds are at the Court's discretion. See e.g. Chamber v. Nasco, Inc., 501 U.S. 32(1991) (citing Roadway Express, 447 U.S. at 765).

2. Analysis

This case has seen its share of judges. It wa first assigned to Judge Richard H. Kyle and Magistrate Judge Floyd E. Boline, who was replaced six months later by (then) Magistrate Judge Montgomery. The matter was then reassigned Judge John R. Tunheim and Magistrate Judge John M. Mason, who was replaced by Magistrate Judge Raymond L. Erickson. Upon Magistrate Judge Erickson's recusal on May 22 of this year, the case was referred to the undersigned.

A thorough review of the file shows what can only be characterized as an egregious level of practice by Plaintiff's counsel throughot the course of this case. While the parties entered into a plain and clear confidentiality stipulation which was entered as a protective order by Magistrate Judge

was entered as a protective order by Magistrate Judge Montgomery on January 9, 1995 [Docket No. 63], Plaintiff's counsel has had to be reminded of his obligations under that protective order virtually continuously. See order dated Febrary 7, 1995 [Docket No. 87], at 4 fn. 3 (K.e, J.); Order dated March 20, 1995 [Docket No. 113], at 5 and 7 (Montgomery, M.J.); Order dated July 7, 1995 [Docket No. 133], at 2 (Montgomery, M.J.); Order dated August 8, 1995 [Docket No. 155] (Kyle, J.); and Order d ated November 17, 1995 [Docket No. 299], at 4 (Kyle, J.). In addition, the Cort has had repeatedly order documents to be filed under seal because Plaintiff's cousnel insisted on referring in documents not filed under seal to an inadvertently produced privileged document which he was ordered to return to Unisys and which fell squarely within the scope of the protective order, but which he memorized.[3] See Order dated October 6, 1994 [Docket No. 36] (Cudd, M.J.); Order dated December 8, 1994 [Docket No. 54] (Montgomery, M.J.); Order dated October 24, 1995 [Docket No. 285] (Montgomery, M.J.); and Order dated November 2, *1995* [Docket No. 291] (Montgomery, M.J.). Most recently, the undersigned had to seal Plaintiffs Memorandum in Opposition to Defendant's Motion for Sanctions [Docket No. 342] because Plaintiffs counsel chose to refer to a pending qui tam action which is sealed in its entirety. See Order dated August 18, 1997 [Docket No. 350]. Plaintiff's counsel was aware that the qui tam action was initially sealed by Judge Tunheim and his argument at the hearing on this motion that the seal was lifted is patently incorrect. Mr. Nathan was advised that the United States would seek to partially lift the seal to allow the allegations in the complaint to be shown to Unisys and that aside from this partial lifting the complaint and all other case filings remained sealed. See Affidavit of Assistant United States Attorney Joan D. Humes [Docket No. 352], in particular 4 thereof and footnote 2 of the ex parte January 22,

attached thereto. See also Order dated January 28, 1997 in Gundacker v. Unisys *Corp.*, Civil File No. 4-96-113 (Qui Tam) (Tunheim, J.):

As Judge Tunheim stated when he issued his Order granting Defendant's motion for summary judgment as to Plaintiff's unlawful discharge claims, the Court is aware that Plaintiff has made significant allegations of fraud in Unisys contracts with the United States Navy. Like Judge Tunheim the undersigned takes no position on the merit of those claims. Rather, the Court is solely concerned with Plaintiffs and his counsel's actions in this case.

Defendant's motion to amend its answer and to assert counterclaims was granted on August 3, 1995 by Magistrate Jugde Montgomery. See Order [Docket No. 154]. As part of its prayer for relief Unisys sought "[a] order requiring the immediate return to Unisys of any and all records, documents, writings, and all other materials including copies, that are the property of Unisys and wrongfully possessed by Gundacker in violation of the Employee Confidential Information and Intervention Agreement." See Amended Answer to Third Amended Complaint and Counterclaims [Docket Nos. 311 and 312], at 12. Following the grant of summary judgment in favor of Unisys on Plaintiffs claims, Unisys moved for a temporary restraining order. Following a referral from Judge Tunheim, this motion was heard by Magistrate Judge Erickson on March 28, 1997, and taken under advisement. The scope of the motion was to "[preclude] Plaintiff Erik Gundacker or his agents, including Dale C. Nathan and Nathan & Associates, from disclosing documents or information belonging to Unisys Corporation" and "(for such other and further relief as the Court may deem just and equitable." See Motion for Temporary Restraining Order [Docket No. 320). The motion was not limited in any

Order [Docket No. 320). The motion was not limited in any way, and particularly was not limited to disclosures to the media.

On April 11, 1997 the parties participated in a successful court-ordered settlement conference.[4] At the conclusion of that conference, the parties agreed that Unisys would dismiss its counterclaims against Plaintiff with prejudice. In return, Plaintiff and his counsel would return on or before May 31, 1997 certain documents and all copies thereof; that have become known as the "Gundacker documents." In short, they constitute original documents provided to Plaintiff by Unisys in the scope of Plaintiffs work and taken by Plaintiff from Unisys' premises during his employment and prior to his separation from the company. The documents were to be coded, such coding to be supervised by an independent third party, and were subsequently to be stored in a locked location at Unisys' counsel's offices, with the only key to be placed under seal in the court file. Unisys was to pay the costs of storing the documents until resolution of Plaintiffs appeal of various court orders.

The parties agreed that if Plaintiff would lose the appeal and if the grant of summary judgment in favor of Unisys would be upheld, Unisys would then have the right to do whatever it pleased with the documents. If Plaintiff would succeed on appeal instead, Plaintiff would be entitled to seek a court order allowing him to obtain the documents. The parties further agreed that Plaintiff might need a small number of documents for purposes of appeal, and that such use would be permitted as long as the documents would be filed under seal. Finally, Plaintiff and his counsel would certify the degree of their disclosure of the documents to Unisys and they would agree not to make any further disclosures in the future. Both

of the agreement. See Transcript [Docket No. 335). Magistrate Judge Erickson and all parties agreed that Unisys' motion for a temporary restraining order became moot as a result of the settlement. ~~ Transcript of Settlement Conference [Docket No. 335], at 11.

Shortly after the parties reached their settlement agreement, Mr. Nathan indicated in correspondence to Unisys' counsel that "[n]othing in the settlement agreement prevents Mr. Gundacker from providing copies, of the Gundacker Documents to law enforcement officials." _.~ Exhibit E to the Fourteenth' Affidavit of Joseph 0. Schmitt [Docket No. 340]. This Court finds the statement irreconcilable with the parties' and Magistrate Judge Erickson's conclusion at the time of the settlement that Unisys' motion for a TRO had become moot, because if Plaintiff would have limited the settlement terms to the media, the motion would in large part have remained alive.

Following further communications, Magistrate Judge Erickson requested the parties to be available for a telephonic hearing on April 18, 1997. Mr. Nathan indicated in a threatening letter to Unisys' counsel dated April 17, 1997 that he would tape the telephone conference, that the media might be present to hear the telephone conference, and that he reserved the right to provide copies of the tape and opposing counsel's letters to federal officials, the media, and the Lawyers Professional Responsibility Board. See Exhibit I to the Fourteenth Affidavit of Joseph G. Schmitt [Docket No. 340], at 6. Mr. Nathan further wrote that

> Nothing less than a written order not under seal by a judge specifically prohibiting me from providing copies of the Gundacker documents to the United States Government will prevent me from providing

> States Government will prevent me from providing these documents to the United States Government if we decide to do so. We will obey such an order if it is issued. We will also appeal that order.

Id at 1 (emphasis added)

The problem with this statement is that Mr. Nathan implied he would not obey a court order if it were not in writing or if it were filed under seal. Such statements by an officer of this Court are inexcusable. The integrity of the judicial process depends to large extent on obedience of properly issued court orders by the parties and especially by their attorneys. In this case, Mr. Nathan has implicitly or explicitly stated numerous times that the Court and in particular (then) Magistrate Judge Montgomery and Judge Kyle were accessories to a cover-up of a federal crime, impeded a federal investigation, and obstructed justice. Mr. Nathan appears to have lost sight of the fact that the Court and its judicial officers are merely enforcing the explicit language of a protective order Plaintiff and his counsel stipulated to and that the Court would not need to address these issues if Mr. Nathan would properly file papers under seal when they refer to privileged data or sealed files.

Following Mr. Nathan's letters and instead of the scheduled April 18, 1997 telephonic hearing, Magistrate Judge Erickson convened the parties on April 21, 1997 at the United States Courthouse in Saint Paul. The transcript of the April 21, 1997 conference reveals the following crucial statements:

> Mr. Schmitt: . . . But in so far as the documents are concerned, I want to clarify that the way this is being resolved is that Mr.

provide copies of the documents to anyone prior to turning them over to Unisys. And I just want to clarify that so that that's done and we don't have to come back before the Court another time.

Mr. Nathan: Your statements is completely true. And the only exception to that is if I get a subpoena or any other process which — I'm not quite sure if I should bring that to the attention of the Court, or alert the other side or what I should do. But there is that possibility.

The Court: I would be very surprised if the United States Attorney, who has been hovering around this case in the personage, perhaps, of I can't think of the investigator's name.

Mr. Nathan: [Boucek].

The Court: [Boucek].

I mean, if— huh, if you get a subpoena, I think we ought to be able to address that matter. I don't want to. I mean, I want to see this case over with. And I think it is over with. If Mr. [Boucek] thinks that he's going to get a subpoena from the Court, I mean, he certainly has his entitlements.

Mr. Nathan: I'm only honestly mentioning the possibility that was mentioned to me. That's an honest representation. Whether or not it's going to happen, I don't know, and I'm bringing it to the Court's attention.

The Court: Okay. Mr. Schmitt?

Mr. Schmitt: If I may, Your Honor.

The only circumstance I can see under which a subpoena would be issued is if Mr. Nathan were to contact the United States Attorney and tell them that he can 't give them copies of these documents which he has, but he could if a subpoena was issued, thus essentially asking for the issuance of a subpoena to obtain through a subpoena what the settlement agreement has just established may not be obtained otherwise. And I think the best way to resolve that would be if Mr. Nathan would agree not to ask for such a subpoena and if Mr. Nathan would agree to return the documents to Unisys as soon as possible. I know we set a date of May — 45 days from the last conference, which I believe is May 26, if I'm not mistaken. And if that could be accelerated such that we would have the documents as soon as possible, perhaps this issue would be disposed of and we would not be forced to trouble the Court once again.

The Court: Mr. Nathan?

Mr. Nathan: I think we have got to the point where if there is a subpoena, the Court's going to be involved. I'm not going to be asking for a subpoena. That much I want the record to show. But as to any other communications between myself and — I don't want to cross over into an area where I bow that I'm not supposed to discuss any of those matters.

So I think Unisys can rest assured that if there is any subpoena, they now know that they're

address that. And I'd like to leave it like that.

The Court: There was a May-something-or other date. I don't know that it was May 24 or whatever. You wanted to assure that every document, every page was Bates-stamped. I don't know that we can unravel part of the settlement and not unravel the rest of it. I think you're all bound by what you agreed to back then. Mr. Nathan has indicated that he will not try to circumvent the settlement or circumvent the prior orders of this Court that remain in effect I don't know that there's anything more we can do. I mean, Mr. Nathan is an officer of the Court, a responsible individual. If the United States Government want those documents, Unisys has indicated that they're prepared to give them the documents.

Mr. Schmitt: If I may, Your Honor. The only concern that Unisys Corporation would have in so far as responding to a subpoena is that we would like to be able to respond to the subpoena ourselves, since they are our documents.

The Court: Let's do it this way: Mr. Nathan unless you have very strong objection, and I'd like to know the authority for it, if you receive a subpoena, before it can be effectuated I want you to advise Mt. Schmitt.

Mr.Nathan: Yes.

The Court: If Mr. Schmitt has a problem with that, jointly advise the Court.

Mr. Nathan: I agree to that I think that resolves our concerns.

See Transcript [Docket No. 336], at 9-12 (emphasis added).

See Transcript [Docket No. 336], at 9-12 (emphasis added).

As Mr. Nathan acknowledges in Plaintiffs Second Memorandum in Opposition to Defendant's Motion for Sanctions [Docket No. 346], at 6-7, subsequent to the April 21, 1997 conference "[he] informed the government's investigator of Judge Erickson's instructions. The government served Gundacker with a subpoena and [Gundacker and Nathan] complied with that subpoena." Thus, the Court agrees with Defendant that Mr. Nathan did exactly that which defense counsel had predicted he might do and which Mr. Nathan had represented, as an officer of the court, he would not do. Further, no notice was given to Unisys until after the documents were turned over to Mr. Boucek and Unisys was not provided an opportunity to seek to quash the subpoena Not with standing Plaintiffs various arguments in opposition to the motion for sanctions, the merits of such a motion to quash and whether Unisys would have been successful in its opposition to production of the documents is not before the Court at this time.

The Court finds Plaintiffs and Mr. Nathan's conduct throughout the latter part of this case highly inappropriate and contemptuous. Mr. Nathan has made repeated representations that he would comply with the parties' agreement and has not. In light of the history of this case and Plaintiff's and his counsel's repeated vexatious attempts to publicize an inadvertently produced privileged document, as well as the events following the settlement conference, including the written exchanges between the parties, a conference call with Magistrate Judge Erickson, the April 21, 1997 conference, and Mr. Nathan's promises as an officer of the court at that conference the Court concludes that complying with the subpoena regarding the "Gundacker Documents" without providing advance notice to Unisys was objectively and subjectively in bad faith and was not a mere

participated in the settlement conference in bad faith, in contravention of Fed. R. Civ. P. 16. The Court in addition finds Mr. Nathan's conduct in threatening both Unisys and its counsel and Magistrate Judge Erickson through his statements that he would tape record the April 18, 1997 telephonic conference and to have the press present in his office to listen to the conference to exceed all bounds of permissible conduct. The Court concludes that Plaintiff and his counsel have in fact multiplied the proceedings in this case unreasonably and vexatiously so that they should be required to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of that conduct.

Plaintiffs and his counsel's conduct in this matter has further needlessly but significantly increased the caseload of this Court. The Court accordingly recommends that a punitive monetary sanction be imposed upon them to deter either from repeating such behavior. The Court finally recommends that Mr. Nathan be publicly admonished in an Order to be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility.

B. Unisys' Request for Clarification of its Right to Review the Gundacker Documents Currently Held by the Government

Defendant has informally requested clarification as to whether it is entitled to inspect the Gundacker documents produced to the Government by Plaintiff and Mr. Nathan. It is the Court's understanding that the Government has left the materials intact until this time without reviewing the same. No formal motion is pending and the Court is not aware of the United States' position with

the Court is not aware of the United States' position with respect to Unisys' request. The Court accordingly requests that the United States not review the Gundacker documents for a period of 21 days from the date of this Report and Recommendation, to allow Unisys to bring an appropriate motion directed to the Government, if Unisys so desires.

Based upon the above, and upon all the files, records, and proceedings herein, IT IS HEREBY RESPECTFULLY RECOMMENDED that:

1. Defendant Unisys' motion for sanctions [Docket No. 338] be GRANTED;

2. Plaintiff and his counsel be held jointly liable pursuant to Federal Rule of Civil Procedure 16(f) for the costs and fees incurred by Unisys, its representative, and its counsel in connection with the April 11, 1997 settlement conference, and that they be ordered to forthwith reimburse Unisys the sum of $3,747.06;

3. Mr. Nathan be held individually liable pursuant to 28 United States Code § 1927 for the costs and fees incurred by Unisys and its counsel subsequent to the April 11, 1997 settlement conference, and that he be ordered to forthwith reimburse Unisys the sum of $6, 111.07;

4. A punitive monetary sanction in the amount of $7,500.00 be imposed pursuant to Federal Rule of Civil Procedure 16(f) and the inherent powers of the Court on Plaintiff and his counsel jointly, and that they be ordered to forthwith pay such sum to the Clerk of Court; and

5. Mr. Nathan be publicly admonished in an Order to be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility.

U.S.D.C.J.

Pursuant to 28 U.S.C. § 636(b)(l) and Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court and serving all parties with a copy, written objections which specifically identify the portions of the Report or Recommendation to which objection is being made, the basis for the objection(s), and a brief in support thereof of. Such objections shall be filed and served no later than SEPTEMBER 11, 1997.

A party may respond to the objecting party's brief within ten days after service thereof.

All briefs filed under this rule shall be limited to ten pages. A District Judge shall make a de novo determination of those portions to which objection is made.

Footnotes

1 For example decisions denying requests to proceed in forma pauperis, decisions striking pleadings for failure to comply with Fed. R. Civ. P. 8, and decisions voluntarily dismissing claims. See Robinson, 148 F.R.D. at 640 fn. 9.

dismissing claims. See Robinson, 148 F.R.D. at 640 fn. 9.

2 The Court declines to follow the example of Magistrate Judge Karol, who in Motzkin v. Trustees of Boston University, 1997 WL 136245, fn. 1 (D. Mass., Mar. 14, 1997) issued an order to the extent that he had the authority to decide the matter and a report and recommendation to the extent he did not.

3 The record shows that although the Order provided that the document was to be returned forthwith, see Order dated October 19, 1994 [Docket No. 38], it was not returned until days later without any explanation for the delay, and only after prompting by Unisys' counsel.

4 The Court notes that on April 8, 1997 Mr. Nathan wrote an -- in the opinion of the Court highly inappropriate -- letter to Magistrate Judge Erickson, stating that

> This letter is to confirm that Mr. Erik Gundacker and I will be present on April 11, 1997 at 8:30 a.m. at room 230 of the U.S. Federal Courthouse in St. Paul, Minnesota, for settlement discussions. We will be accompanied by my associates Mr. Darwin Kulzer and Mr. Linn Firestone. We will not proceed without them.
>
> We emphasize the fact that frauds by Unisys and its attorneys against the United States Government amount to hundreds of millions of dollars. We are going to do everything we can to expose these frauds.

Exhibit C to the Fourteenth Affidavit of Joseph G. Schmitt [Docket No. 340] (emphasis added).

DISTRICT OF MINNESOTA
FOURTH DIVISION

ERIK GUNDACKER,
Civil No. 4-95-676 (JRT/JGL)

Plaintiff,

V ORDER

UNISYS CORPORATION,

Defendant.

ADOPTING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE

Filed Oct 24, 1997

Dale C. Nathan, NATHAN & ASSOCIATES, 3600 Kennebec Drive, Eagan, MN 55122, for plaintiff

Thomas M. Sipkins and Joseph G. Schmitt, HALL ELAND, LEWIS, NILAN, SIPKINS & JOHNSON, 220 South Sixth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court upon plaintiffs objections to the Report and Recommendation of United States Magistrate Judge Jonathan G. Lebedoff dated August 25, 1997. The Magistrate Judge recommends that defendant's motion for sanctions be granted.' The Magistrate Judge recommends that: 1) plaintiff and his counsel be held jointly liable pursuant to Fed. R. Civ. P. 16(f) for the costs and fees incurred by Unisys, its representative, and its counsel in

incurred by Unisys, its representative, and its counsel in connection with an April 11, 1997 settlement conference in this case;

2) counsel for plaintiff, Mr. Dale Nathan, be held individually liable pursuant to 28 U.S.C. § 1927 for the costs and fees incurred by Unisys, its representative, and its counsel in connection with the April 11, 1997 settlement conference, and that Mr. Nathan be ordered to reimburse Unisys in the amount of $6,111.07; 3) that the Court order plaintiff and his counsel to pay a punitive monetary sanction to the Clerk of Court in the amount of $7,500 pursuant to Fed. R. Civ. P. 16(f) and the inherent powers of the Court; and 4) Mr. Nathan be publicly admonished in an Order to be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility.

Plaintiff and his counsel object to the recommendation that they be sanctioned. The Court has conducted a de novo review of the Report and Recommendation on this pretrial matter pursuant to 28 U.S.C. § 636(b)(1)(C) and D. Minn. LR72.1(c)(2). The Court agrees with the Magistrate Judge's findings that:

> 1) the judges and magistrate judges of this Court have repeatedly reminded plaintiffs counsel of his obligations under the confidentiality stipulation which was entered as a protective order in this case;
>
> 2) this Court has repeatedly ordered documents plaintiff has filed to be sealed because plaintiffs counsel mentioned in them an inadvertently produced privileged document which was subject to the protective order;

participated in a settlement conference on April 11, 1997 and agreed to a settlement;

4) that plaintiffs counsel stated his intention to violate the settlement agreement;

5) that plaintiffs counsel implied that he would not obey an order of this Court if it were filed under seal or if it were not in writing;

6) that plaintiffs counsel repeatedly has impugned the integrity of the Court and its judicial officers;

7) that plaintiffs counsel represented to the Court that he would not seek a subpoena from the government and that he would advise defense counsel before complying with such a subpoena, yet he took actions that had the effect of soliciting a subpoena and failed to notify defense counsel until after he complied with it.

The Court agrees with the magistrate judge that such conduct evidences objective and subjective bad faith and contempt that justify the imposition of monetary sanctions and a public admonition of counsel.

ORDER

Based upon all of the files, records and proceedings herein, the Court OVERRULES plaintiffs objections [Docket No. 354] and ADOPTS the Report and Recommendation of the Magistrate Judge [Docket No. 353].

IT IS HEREBY ORDERED that:

1) Defendant's motion for sanctions [Docket No. 338] is GRANTED;

2) Plaintiff and his counsel shall be jointly liable for the costs and fees incurred by Unisys, its representative, and its counsel in connection wit the April 11, 1997 settlement conference in this case. Plaintiff and Mr. Nathan shall reimburse Unisys in the amount of

$3,747.06;

3) Counsel for plaintiff, Mr. Nathan, shall be individually liable for the costs and fees incurred by Unisys, its representative, and its counsel in connection with the April 11, 1997 settlement conference. Mr. Nathan shall reimburse Unisys in the amount of $6,1 11.07;

4) Plaintiff and his counsel shall pay a punitive monetary sanction to the Clerk of Court in the amount of $7,500;

5) Mr. Nathan shall be publicly admonished and the Order shall be filed with the National Lawyer Regulatory Data Bank of the American Bar Association's Center for Professional Responsibility.

6) This matter is remanded to Magistrate Judge Jonathan G. Lebedoff for further action consistent with this Order.

Dated: October 24 1997.

Footnotes

1As stated in the Report and Recommendation, the Eighth Circuit has not addressed the question of whether magistrate judges have authority to issue orders on motions for sanctions. Magistrate Judge Lebedoff therefore issued a Report and Recommendation for this Court's consideration.

disclosures to the media.

On April 11, 1997 the parties participated in a successful court-ordered settlement conference.[4] At the conclusion of that conference, the parties agreed that Unisys would dismiss its counterclaims against Plaintiff with prejudice. In return, Plaintiff and his counsel would return on or before May 31, 1997 certain documents and all copies thereof, that have become known as the "Gundacker documents." In short, they constitute original documents provided to Plaintiff by Unisys in the scope of Plaintiffs work and taken by Plaintiff from Unisys' premises during his employment and prior to his separation from the company. The documents were to be coded, such coding to be supervised by an independent third party, and were subsequently to be stored in a locked location at Unisys' counsel's offices, with the only key to be placed under seal in the court file. Unisys was to pay the costs of storing the documents until resolution of Plaintiffs appeal of various court orders.